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NO. 90-563

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED

October Term, 1990

KATHLEEN R. SWAN and WILLIAM O. SWAN,

Petitioners,

vs.

THE STATE OF WASHINGTON,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF WASHINGTON

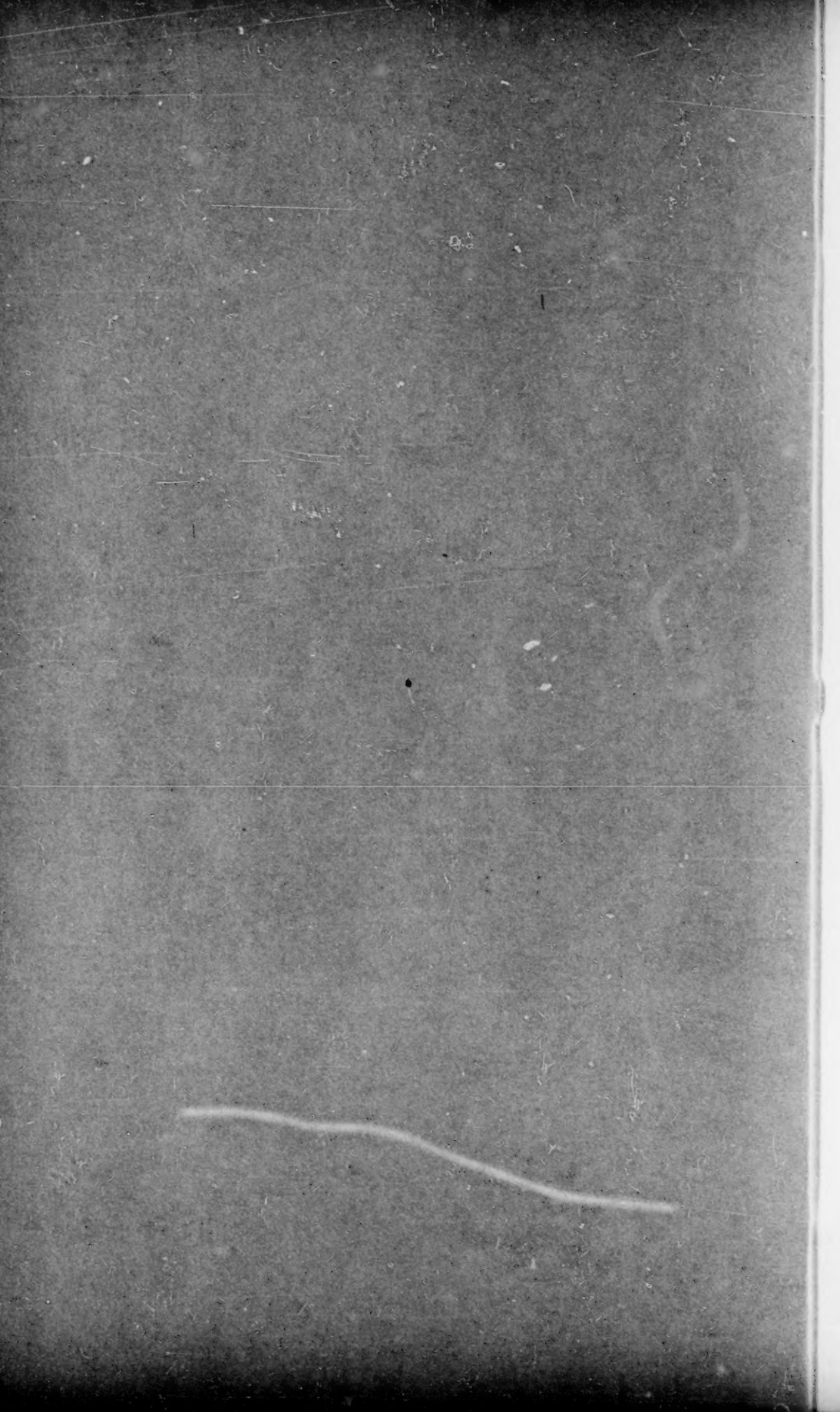
BRIEF IN OPPOSITION TO
PETITION FOR CERTIORARI

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QUESTION PRESENTED

Whether RCW 9A.44.120 (Washington's Child Hearsay Statute), on its face and as applied in the Swans' trial for statutory rape in the first degree, is consistent with the Confrontation Clause of the Sixth Amendment.

JURISDICTION

Respondent concurs with Petitioner's statement of jurisdiction.

STATEMENT OF THE CASE

Consistent with the purpose of a brief in opposition as described by Rule 15 of the United States Supreme Court Rules of Practice, the State of Washington sets forth below a separate statement of the case to clarify the true

1

factual context of State v. Swan, 114 Wn.2d 613, 790 P.2d 610 (1990).

On October 2, 1985, 3-year-old B.A., daughter of defendants Kathleen and William Swan, walked out of a day-care center bathroom with her dress tucked in her tights. The center's teacher, Lisa Conradi, untucked the dress and told B.A. to keep her private parts covered. When B.A. appeared confused, Conradi explained that "private parts" means the areas covered by her bathing suit. B.A. pointed to her chest and crotch area. Conradi then added that no one should look at or touch B.A.'s private parts, whereupon B.A. said, "Uh-huh, Mommy and Daddy do." When asked "What do Mommy and Daddy do?" B.A. replied, "Mommy spits on me." Conradi asked where, and B.A.

pointed to her crotch.¹ At this point, Conradi gave B.A. a book and took the other children in the room downstairs.

When Conradi returned, she asked B.A. if her parents did anything else to her private parts. B.A. said she spits on Mommy in her private parts and that Daddy "puts his potty in me and it hurts real bad." Conradi explained that a man's potty was a penis. The two then walked around the room. B.A. played peekaboo from behind a door with Conradi several times, and said, "My daddy plays peekaboo with me." She also said, "My daddy puts his penis in my mouth and icky milk comes out." When asked who else

¹ Defendant's implicit assertions notwithstanding, Conradi made it abundantly clear at trial that she did not even suspect B.A. might have been sexually abused until B.A. said that her mother spits on her, and pointed to her crotch.

played this game, B.A. said "Josh does."² B.A. also said they played the games in the bedroom with their clothes off.

When Cindy Bratvold, the day-care owner, returned to the center a short while later, Conradi told her about B.A.'s statements. Bratvold then called Child Protective Services (CPS). After calling CPS, Bratvold asked B.A. whether her close friend R.T., another 3-year-old who attended the same day-care center, played games with B.A.'s parents. B.A. said "yes."

Two CPS caseworkers interviewed B.A. that day. B.A. would not answer questions they posed, but when Conradi

² At trial, both defendants acknowledged that an individual named John had previously lived in their home.

asked in their presence if her mother spit on her or put her mouth on B.A.'s private parts, the child nodded and said "yes." The interview ended when the defendant Kathleen Swan came to take her daughter B.A. home. The CPS caseworkers then decided to interview R.T. and B.A. on October 4, when both girls were scheduled to be at the day-care center.

R.T. came to the center the following day, October 3, but B.A. did not. Bratvold took R.T. upstairs and began to talk to her. Bratvold started by asking R.T. if she liked certain people, including "B.A.'s mommy." R.T. liked the people listed and "kind of" liked Kathy Swan. When asked what she meant, R.T. said "she makes us play funny games." These games included exercise games and ring around the rosy in the

nude and falling on the bed. "Then we kiss Kathy's boobies and we lick her potty, and she does that to us, too."

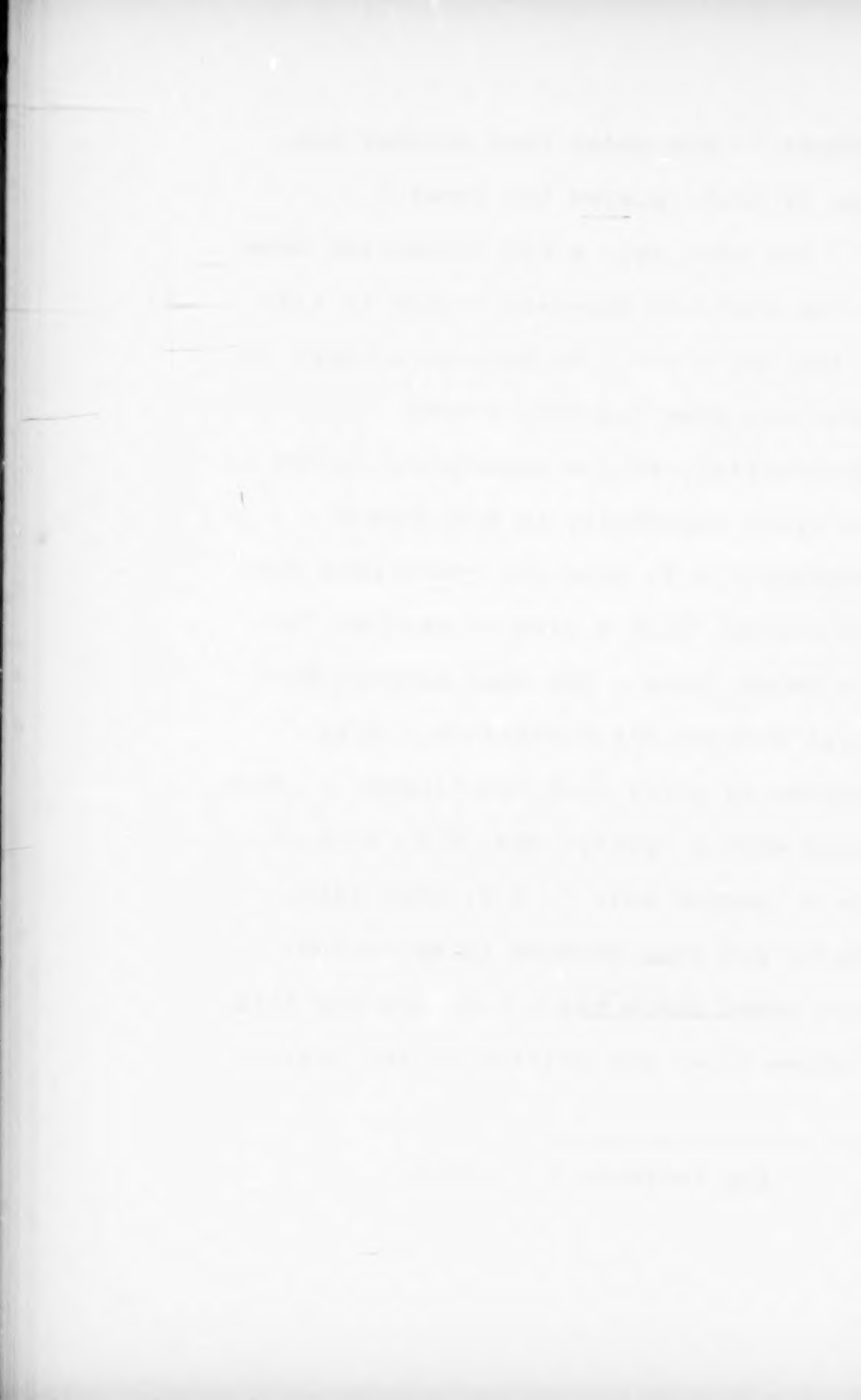
R.T. also said that "Kathy puts -- one time Kathy put something in my potty and made me bleed, and she cleaned it up and told me not to say anything."

R.T. then said she played games with "Uncle Bill" (the defendant William Swan). She said that Uncle Bill's favorite game was the happy birthday game. "And that's where he puts his peepee in my mouth and shakes it around and then he says, 'Here is your happy birthday present,' and something icky gets in my mouth." R.T. also said that the Swans put candles and marbles in her

"peepee." She added that another man, John or Josh, played the games.³

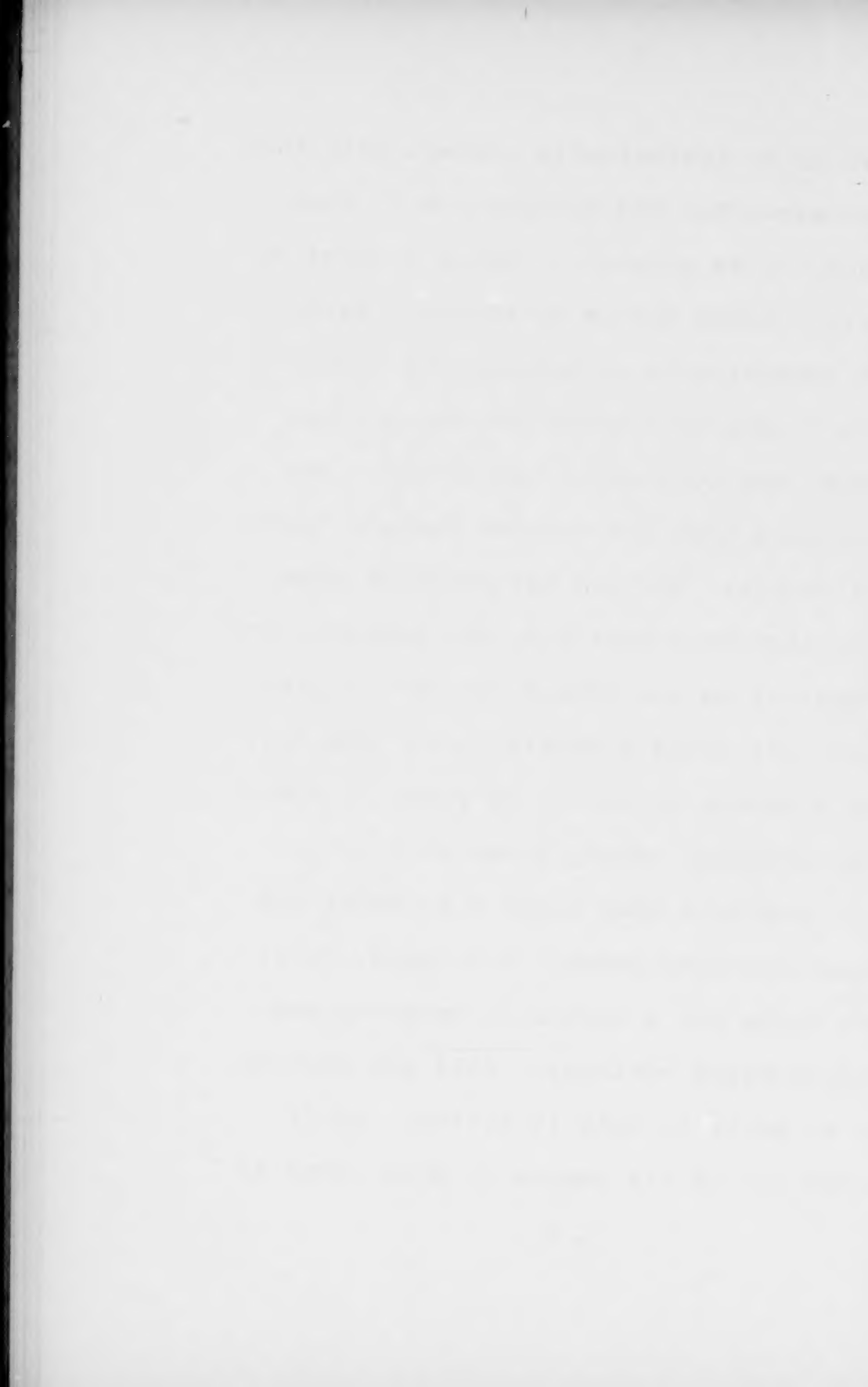
The next day, a CPS caseworker came to the Bratvold day-care center to talk to the two girls. An initial attempt to interview them together proved unsuccessful, so the caseworker talked to the girls separately in Bratvold's presence. R.T. told the caseworker that she played "with a game of marbles" at the Swans' home. She then added, "Bill plays without his clothes on. Bill touches my potty with his fingers." When asked what a "potty" was, R.T. said it was a "peepee hole." R.T. then said, "Kathy put some marbles in my bottom." When asked where her bottom was she said "peepee hole" and pointed to the vaginal

³ See footnote 2., above.



area of an anatomically correct doll that the caseworker had brought. R.T. then added, "I am afraid ... Kathy touches my potty. Blood was on my bottom. Kathy put something in my peepee hole. It hurt." She said there was blood "down there" and pointed to her crotch. She also said that she touched Kathy's "potty and boobies" and put her mouth on them. R.T. then said that B.A. was present, and added, "I am too afraid for it. I just hurt, she poked a marble in it, she just put a marble in it, in my potty." She also offered, "Kathy fixed it."

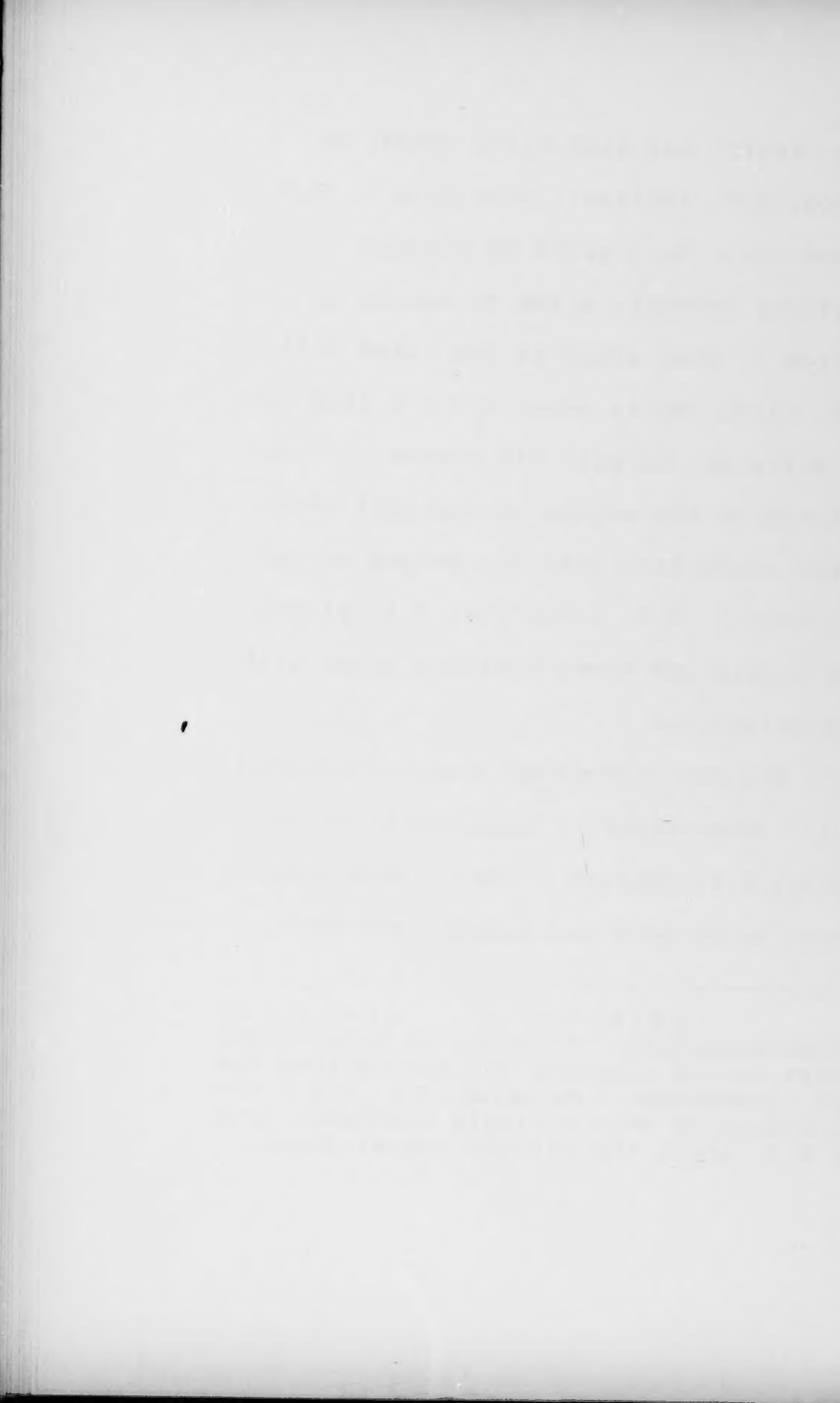
Bratvold then asked R.T. about the happy birthday games. R.T. said, "Bill and Kathy put a candle in my potty and played happy birthday. Bill put marbles in my potty to make it better. Stuff comes out of his peepee." When asked if



the "stuff" was like milk, water, or blood, R.T. replied, "Like milk." She added that "Bill gives me a happy birthday present, gives me one in my bottom." When asked if she liked Bill, R.T. said, "He is mean, I don't like him, he hurts me, he puts his peepee--." R.T. pointed to the vagina on the doll when asked where Bill puts his peepee on her. "It hurt." R.T. added that B.A. played the marble and happy birthday games with the defendants.

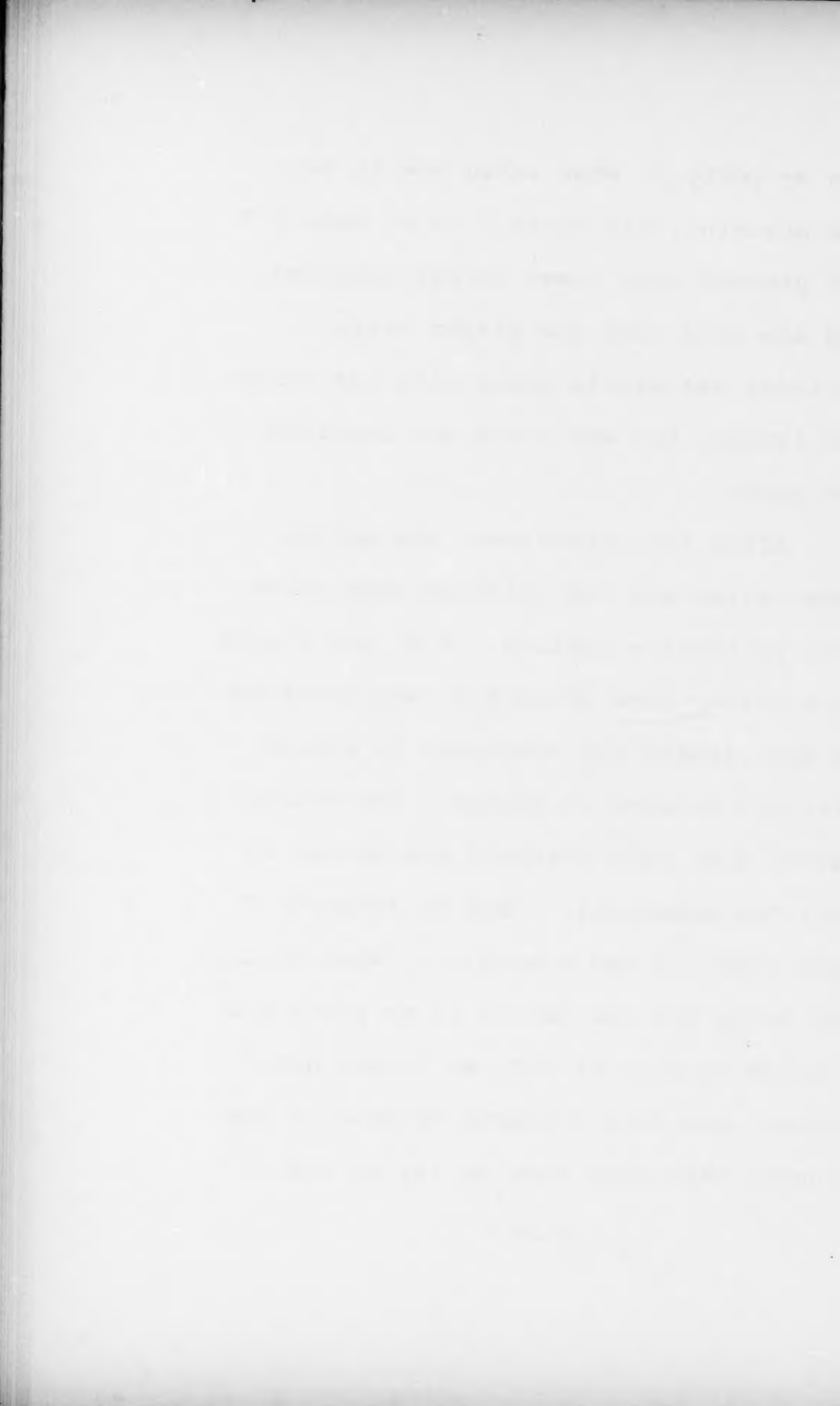
The CPS caseworker then interviewed B.A.⁴ When asked if Mommy spits on her potty, B.A. replied, "Yes." When asked where Daddy puts his peepee, she said,

⁴ Defendants' assertion notwithstanding, nothing in the trial court record supports the notion that the CPS caseworker revealed to B.A. the substance of even a single statement made by R.T. about the alleged sexual abuse.



"On my potty." When asked how it felt, she answered, "It hurts." B.A. said R.T. was present when these things happened, and she said that she played happy birthday and marble games with her mother and father, but she would not describe the games.

After the interviews, the police were called and the children were taken into protective custody. B.A. was placed in a foster home while R.T. was returned to her parents and continued to attend Bratvold's day-care center. Two months later, R.T. told Bratvold she wanted to tell her something. "See my finger? I have burn. I had a burn. ... When Bill and Kathy lit the candle in my potty and I tried to grab it out, my finger got burned, and then I bumped my head on the counter when they made me lay on the



counter." On October 17, 1985, after the alleged abuse came to light, R.T. spontaneously told her father that "Bill and Kathy are bad" because they put marbles in her bottom.

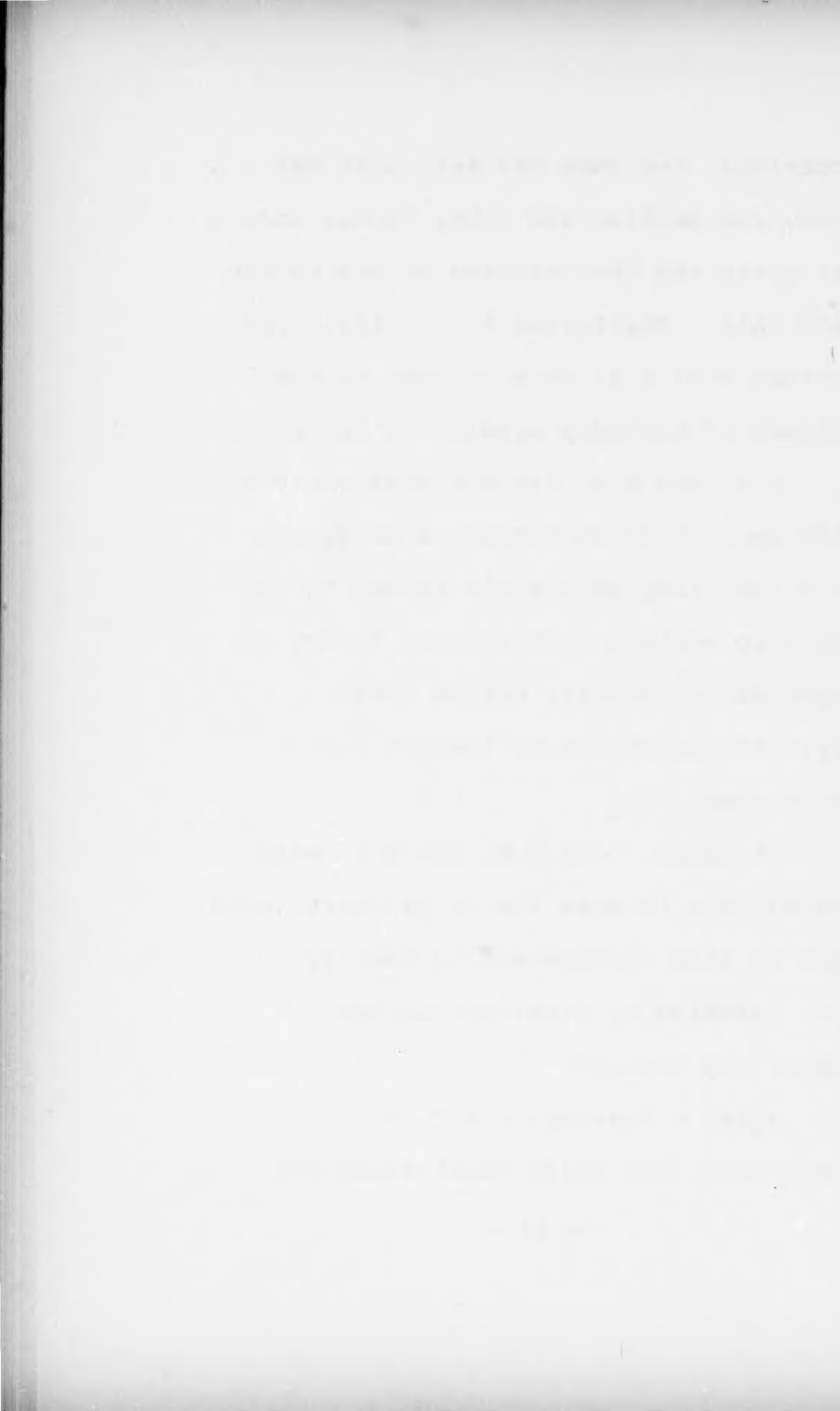
B.A.'s foster mother testified that while drying B.A. off after a bath, B.A. told her that her mommy and daddy put marbles in her potty. The foster mother asked her son for some toy marbles and asked B.A. if they were the type of marbles Daddy put in her potty. B.A. laughed and said no. When asked what kind of marbles Daddy used, B.A. pointed to her crotch. The foster mother then asked if the marbles were on Daddy's potty, and B.A. pointed to her crotch and said, "Yes, and a snake full of marbles." The foster mother also testified that B.A. had mentioned marbles on other

occasions, and once had said that her daddy put marbles and other things inside her potty and then started to cry as she said this. The foster mother testified further that B.A. once brought up the subject of birthday candles in her potty.

B.A. and R.T. did not have contact with each other on October 2 or 3, the days that they separately talked to the day-care workers. On October 4 they sat together but briefly before their separate interviews by the CPS caseworker.

At trial, both B.A. and R.T. were unavailable because the trial court found each of them incompetent to testify. B.A. answered no questions in her competency hearing.

After a hearing on R.T.'s competency, the trial court found her



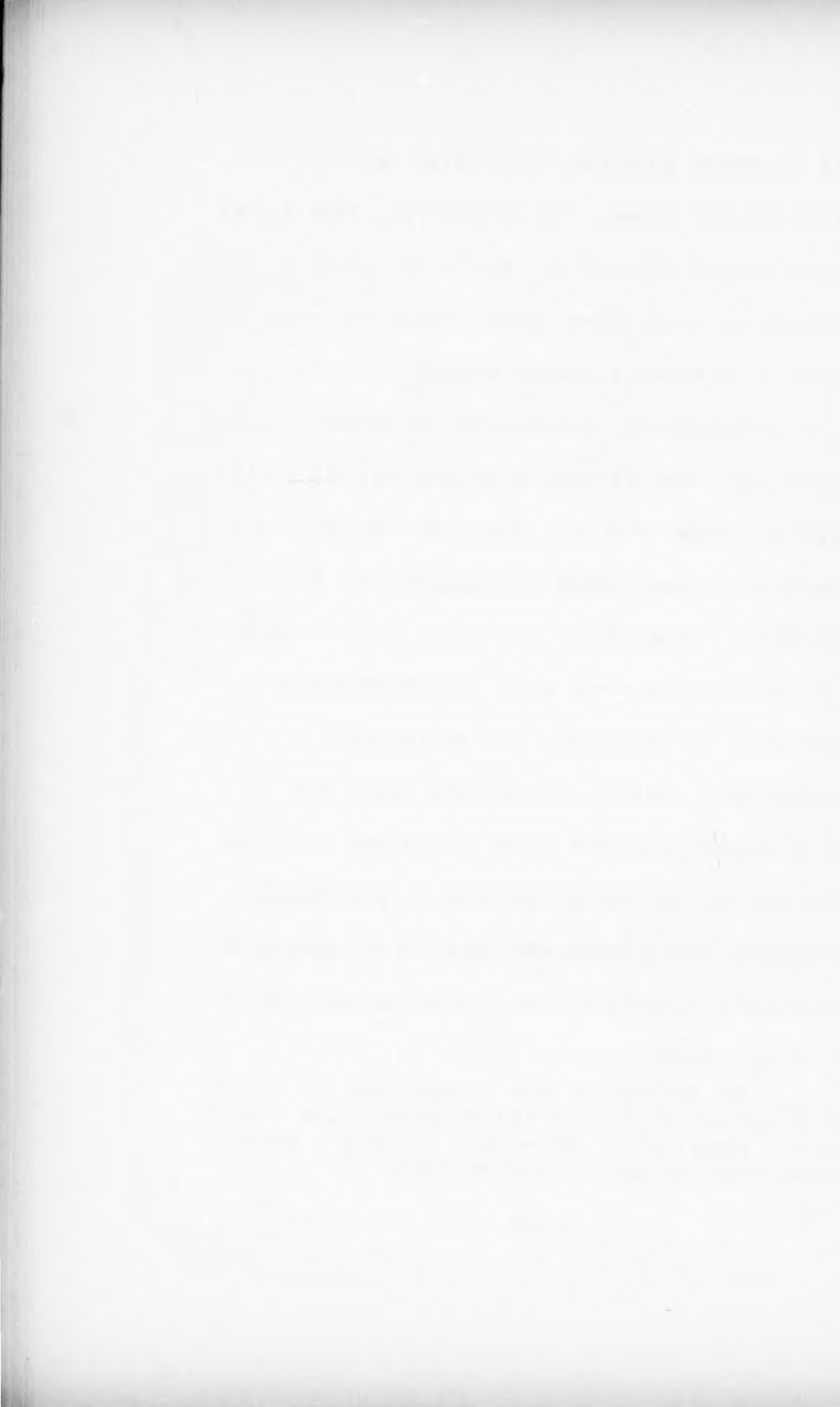
incompetent to testify on the basis that she did not understand the obligation to tell the truth on the witness stand and because she did not have a sufficient memory to speak truly about past events. The defense did not ask questions or make arguments during R.T.'s competency hearing, nor did defense counsel object to R.T. being found incompetent to testify.

The trial court found that both Conradi and Bratvold had a relationship of trust with B.A. and R.T., and that both girls had a reputation for truthfulness. The trial court further found that neither child had a motive to make up stories about the defendants' alleged abuse; prior to their disclosures, B.A. had had a good relationship with her parents, and R.T.

had enjoyed playing with B.A. at defendants' home. In addition, the trial court found that B.A. and R.T. were competent when they made their out-of-court statements about abuse.

Defendants' assertion notwithstanding, the evidence presented at trial against them did not consist "solely" of the above-described statements of B.A. and R.T. Viewed in context, B.A.'s and R.T.'s disclosures were frighteningly parallel in content, and evidenced a precocious sexual knowledge that the little girls could have obtained only as the result of being abused.⁵ Further, evidence was presented that B.A. and R.T. typically greeted each other at day-care

⁵ No evidence was presented at trial to suggest that the three-year-olds could have possibly obtained their sexual knowledge by any other source.



in a sexually oriented manner, that R.T. had complained of pain in her vaginal area on various occasions, that R.T. had engaged in sexualized play with an anatomically correct doll, that B.A. had constantly masturbated at the day care, and that B.A.'s physical and emotional conditions, as observed in medical examinations, were consistent with her having been sexually abused.

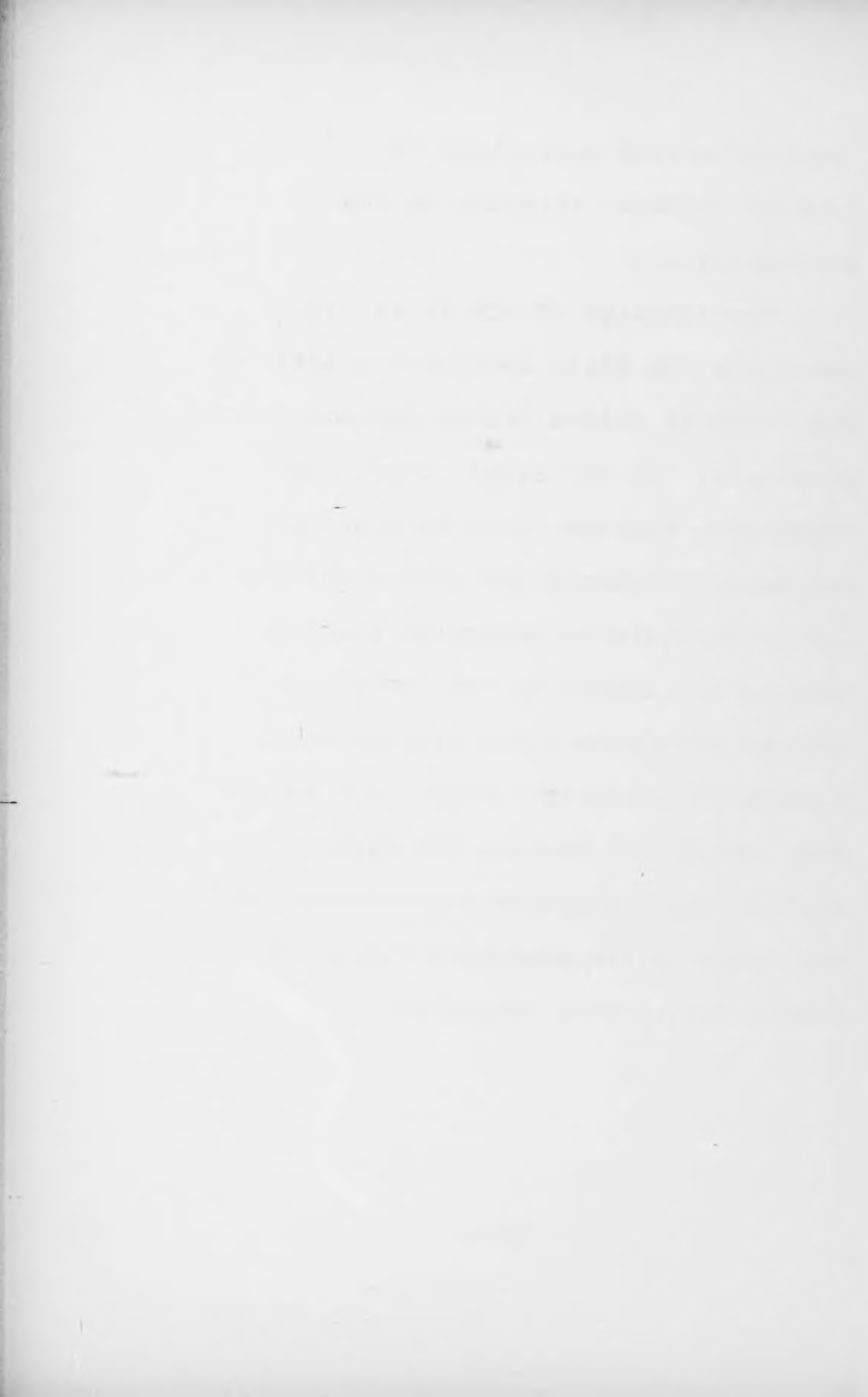
SUMMARY OF ARGUMENT

On its face and as applied, Washington's Child Hearsay Statute is constitutional. Although RCW 9A.44.120 is not one of the traditional exceptions to the hearsay rule, out-of-court statements made by child victims of abuse are admissible under the Confrontation Clause when there are sufficient



"particularized guarantees of trustworthiness" surrounding the statements.

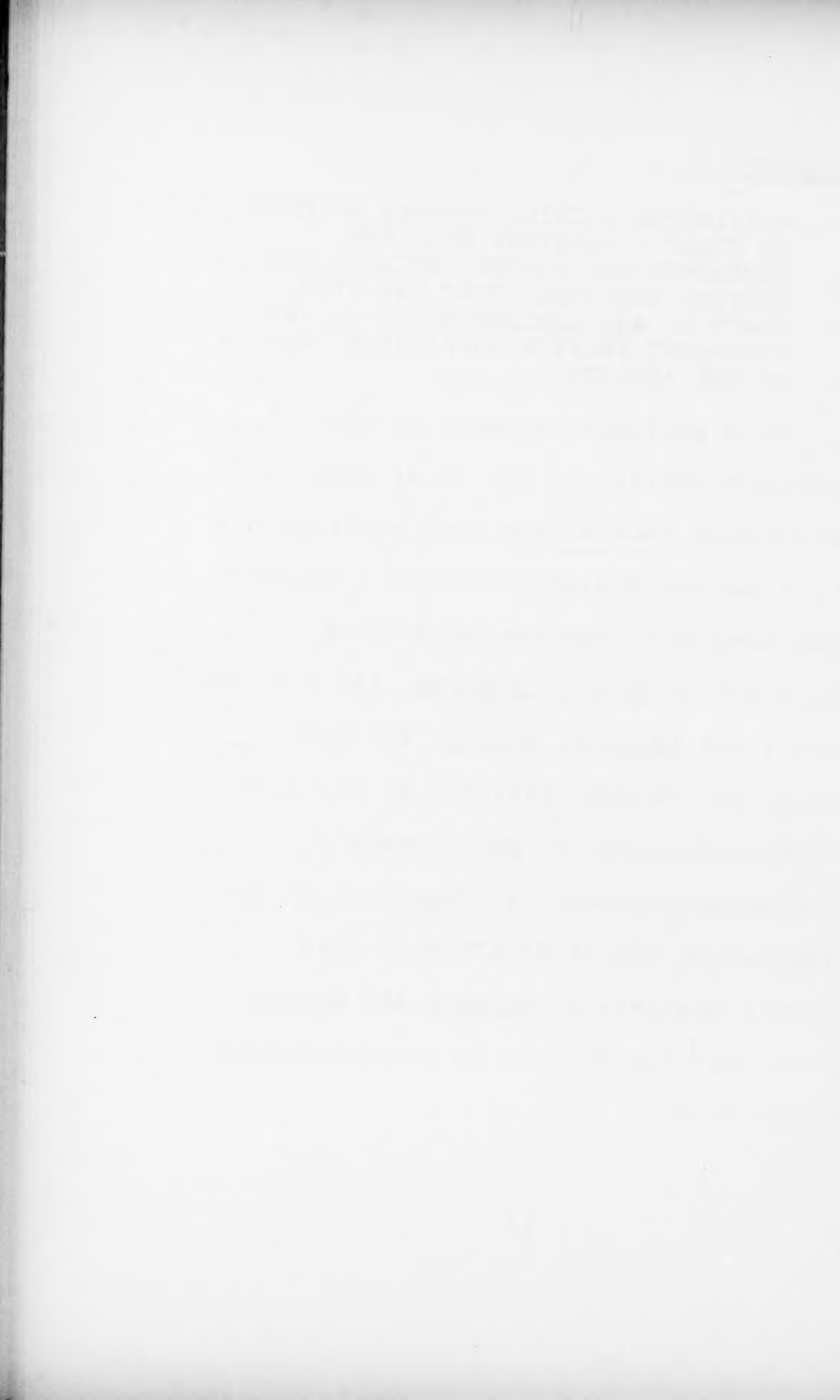
The language of RCW 9A.44.120 parallels the Sixth Amendment guidelines set forth in United States Supreme Court precedent. In the Swans' case, the Washington Supreme Court meticulously reviewed the record and used a multi-factor analysis to determine whether hearsay statements by the two young victims were made under circumstances showing reliability. This Court should deny certiorari because the Washington Supreme Court accurately concluded that the Swans' Sixth Amendment Confrontation Clause rights were respected.



ARGUMENT

A. WASHINGTON'S CHILD HEARSAY STATUTE IS FULLY CONSISTENT WITH THE CONFRONTATION CLAUSE, BECAUSE THE STATUTE REQUIRES "THAT THE TIME, CONTENT, AND CIRCUMSTANCES OF THE STATEMENT PROVIDE SUFFICIENT INDICIA OF RELIABILITY."

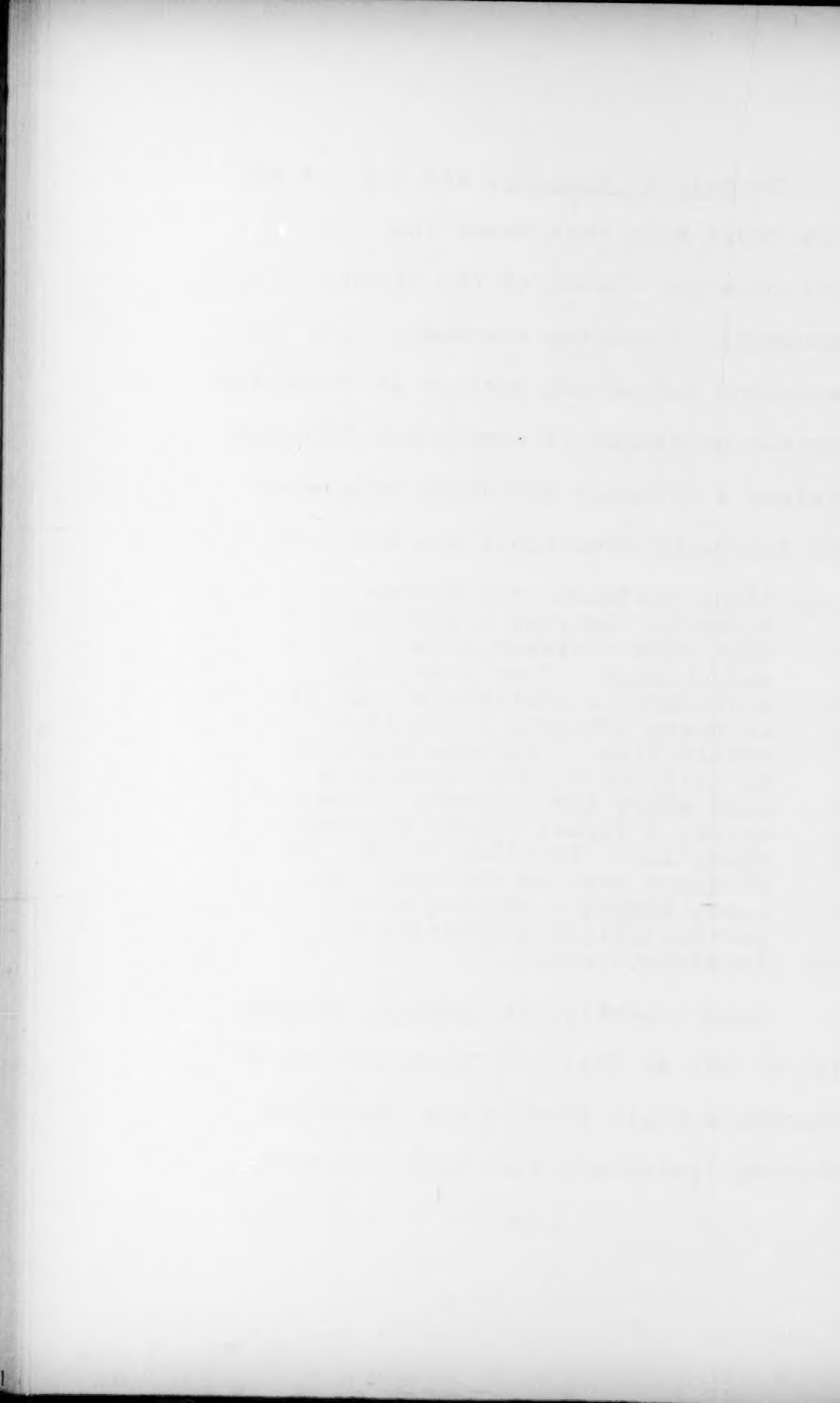
In a perfunctory swipe at the constitutionality of RCW 9A.44.120, petitioners Swan allege that Washington's Child Hearsay Statute contains a standard less stringent than the guidelines explained in Ohio v. Roberts, 448 U.S. 56 (1980) and Idaho v. Wright, 497 U.S. ____ 111 L. Ed. 2d 638, 653, 110 S. Ct. 3139 (1990). Contrary to petitioners' conclusory argument, a comparison of the language of RCW 9A.44.120 with this Court's analysis in Roberts and Wright shows that the statute is constitutional on its face.



In Ohio v. Roberts, 448 U.S. at 66, this Court held that under the Confrontation Clause of the Sixth Amendment, a hearsay statement by a declarant who is not present in court for cross-examination is admissible evidence against a criminal defendant only when the following conditions are met:

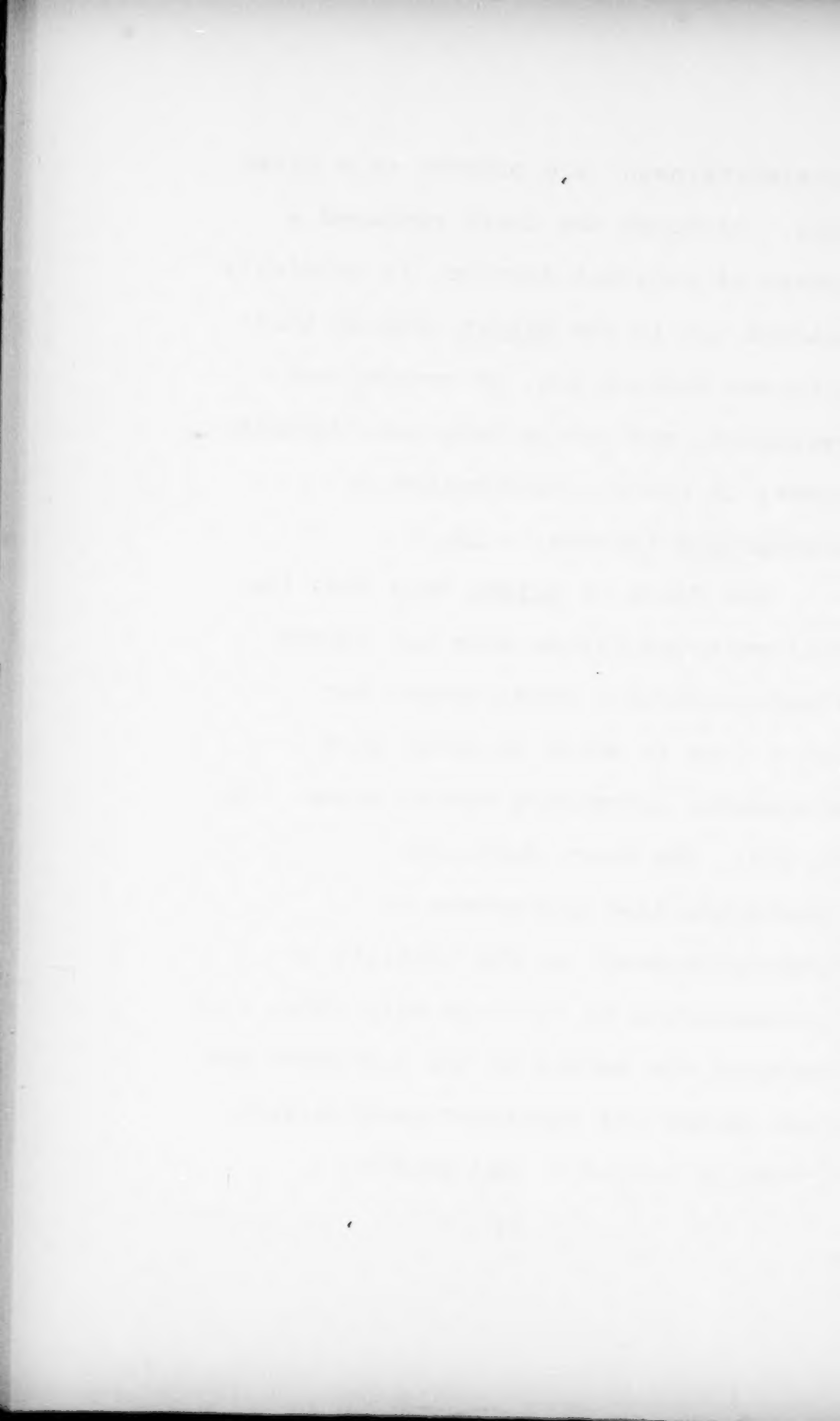
[T]he Confrontation Clause normally requires a showing that [the declarant] is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.

More recently, in Idaho v. Wright, 111 L. Ed. at 656, the Court refused to endorse a rigid formula for assessing whether "particularized guarantees of



trustworthiness" are present in a given case. Although the Court reviewed a number of relevant factors, it carefully pointed out in the Wright opinion that: "[t]hese factors are, of course, not exclusive, and courts have considerable leeway in their consideration of appropriate factors." Id.

The Court in Wright held that the Confrontation Clause does not impose fixed procedural requirements for interviews in which children give statements concerning sexual abuse. Id. at 654. The Court described "particularized guarantees of trustworthiness" as the totality of circumstances to "include only those that surround the making of the statement and that render the declarant particularly worthy of belief." Id. at 655.



Washington's Child Hearsay Statute
complies with the guidelines set forth in
Ohio v. Roberts and Idaho v. Wright.

Pursuant to RCW 9A.44.120:

A statement made by a child
when under the age of ten
describing any act of sexual
contact performed with or on
the child by another, not
otherwise admissible by statute
or court rule, is admissible in
evidence in dependency
proceedings under Title 13 RCW
and criminal proceedings in the
courts of the State of
Washington if:

(1) The court finds, in a
hearing conducted outside the
presence of the jury, that the
time, content, and
circumstances of the statement
provide sufficient indicia of
reliability; and

(2) The child either:

(a) Testifies at the
proceedings; or

(b) Is unavailable as a
witness: Provided, That when
the child is unavailable as a
witness, such statement may be
admitted only if there is
corroborative evidence of the
act.

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TO THE EDITOR OF THE JOURNAL OF
THE AMERICAN CHEMICAL SOCIETY
FROM THE DEPARTMENT OF CHEMISTRY
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RE: [illegible]

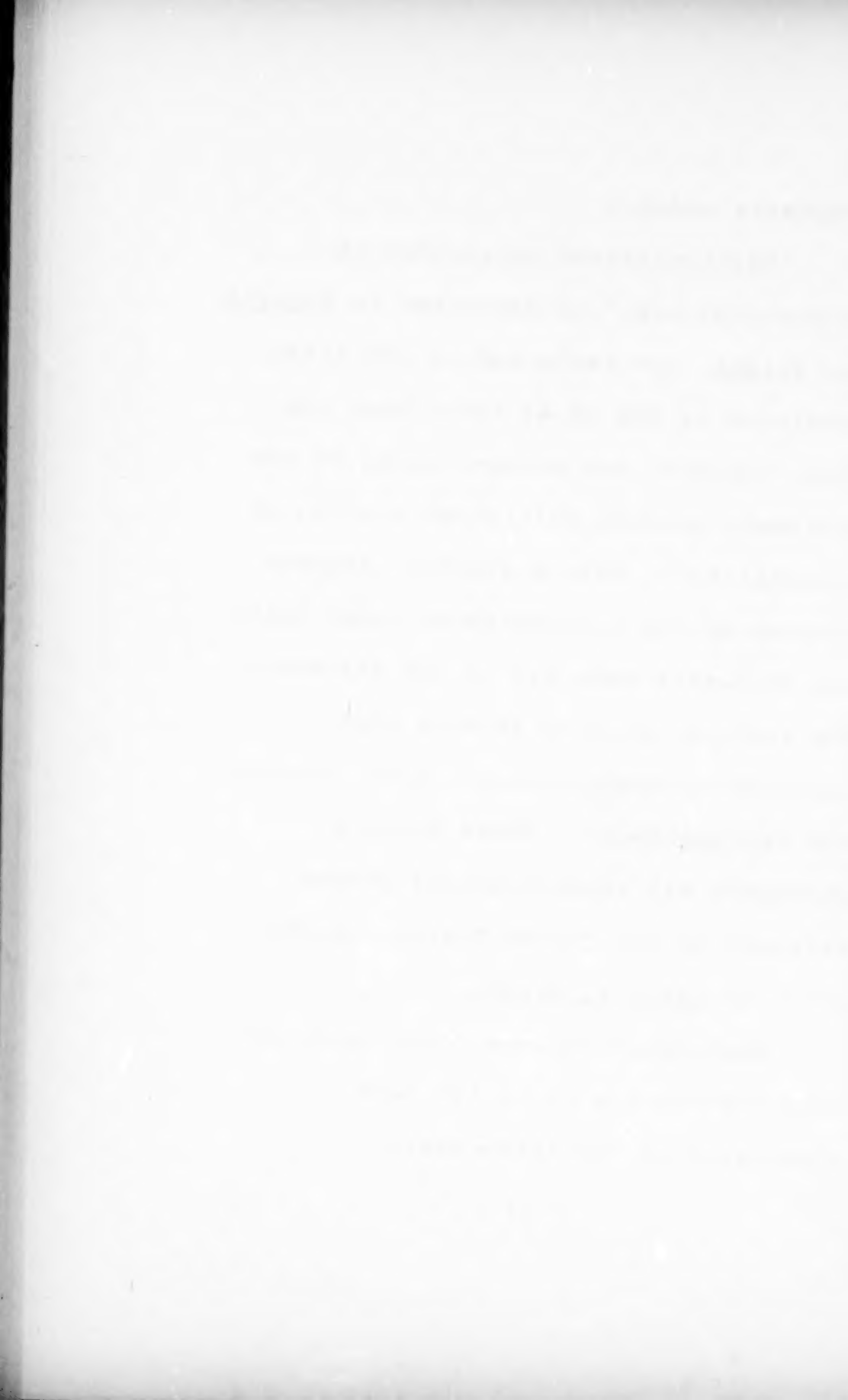
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. . .

(Emphasis added.)

"Particularized guarantees of trustworthiness," as described in Roberts and Wright, are reflected in the first condition of RCW 9A.44.120--"that the time, content, and circumstances of the statement provide sufficient indicia of reliability." This statutory language focuses on the circumstances under which the declarant made his or her statement. The statute includes factors that indicate trustworthiness: time, content and circumstances. These factors encompass all considerations deemed relevant by the United States Supreme Court in Idaho v. Wright.

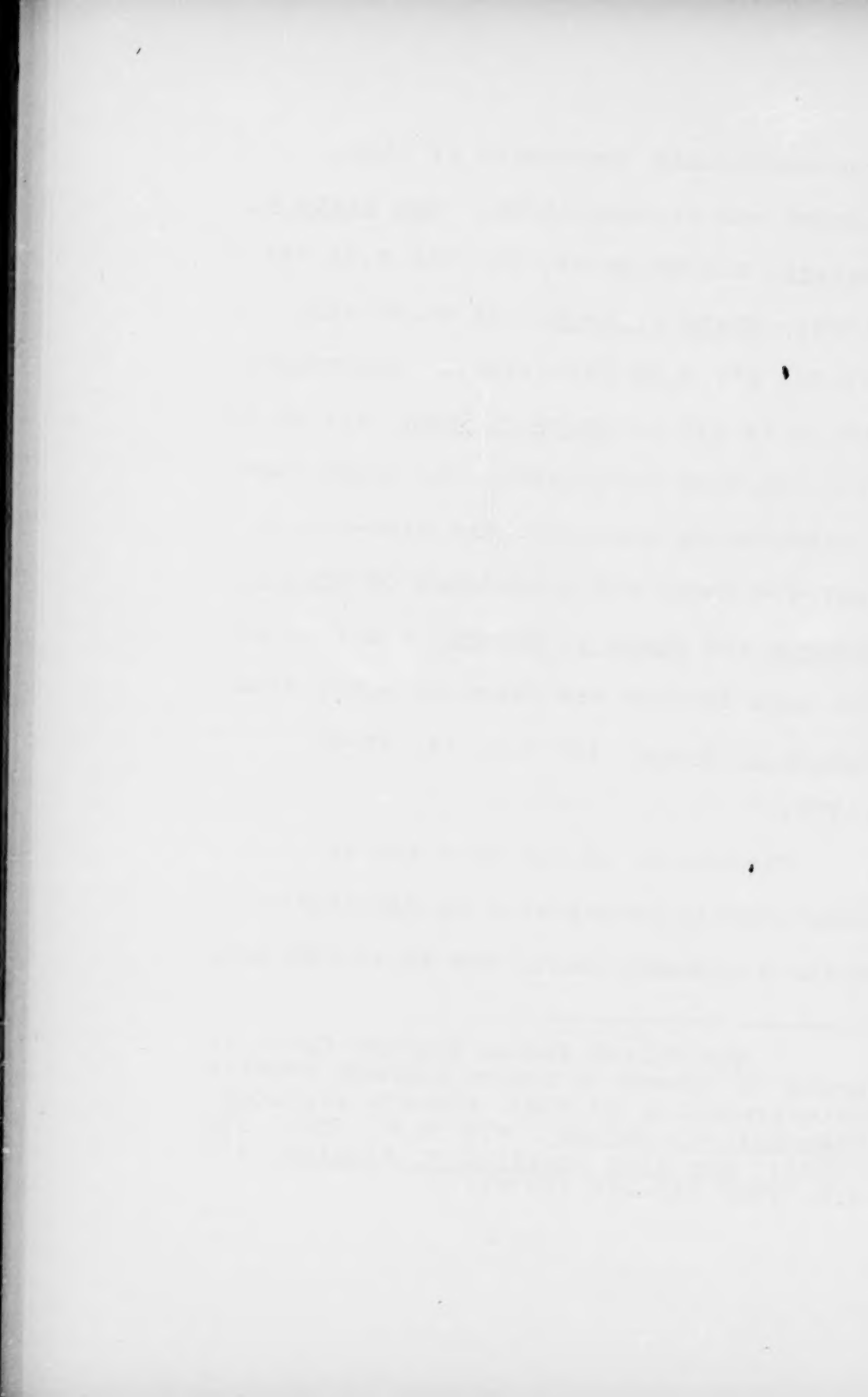
Washington Supreme Court opinions interpreting RCW 9A.44.120 have elaborated on the three basic



trustworthiness components of time, content and circumstances. See State v. Leavitt, 111 Wn.2d 66, 75, 758 P.2d 982 (1988); State v. Ryan, 103 Wn.2d 165, 175-76, 691 P.2d 197 (1984). Construing RCW 9A.44.120 in State v. Swan, 114 Wn.2d 613, 790 P.2d 610 (1990), the court used a nine-factor analysis. The nine-factor analysis meets the guidelines of Ohio v. Roberts and Idaho v. Wright, and four of the nine factors are taken directly from Dutton v. Evans, 400 U.S. 74, 88-89 (1970).⁶

Therefore, on its face and as consistently interpreted by Washington state's highest court, RCW 9A.44.120 does

⁶ The United States Supreme Court is bound to accept a state supreme court's interpretation of that state's statutes. Missouri v. Hunter, 459 U.S. 359, 368 (1983); see also Proffitt v. Florida, 428 U.S. 242, 255-256 (1976).



not conflict with the Confrontation Clause of the Sixth Amendment.

B. THE WASHINGTON SUPREME COURT CORRECTLY HELD THAT CHILD HEARSAY STATEMENTS WERE ADMISSIBLE IN THE SWANS' CASE, BECAUSE THE TOTALITY OF CIRCUMSTANCES ESTABLISHED THAT THE STATEMENTS WERE TRUSTWORTHY.

The Swans allege that the Washington Supreme Court's decision in their case conflicts with the Confrontation Clause, as interpreted in Idaho v. Wright, supra. Petitioners completely ignore the nine-factor analysis used by the Washington Supreme Court to evaluate the trustworthiness of out-of-court statements made by the victims, the Swans' three-year-old daughter (B.A.) and her three-year-old friend (R.T.). This multi-factor analysis, and the conclusion reached by the state supreme court,

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6. The sixth part is a report from the Secretary of the Agriculture on the state of the Agriculture.

7. The seventh part is a report from the Secretary of the Commerce on the state of the Commerce.

8. The eighth part is a report from the Secretary of the Education on the state of the Education.

9. The ninth part is a report from the Secretary of the Justice on the state of the Justice.

10. The tenth part is a report from the Secretary of the State on the state of the State.

follow the guidelines established in
Idaho v. Wright.

In State v. Swan, 114 Wn.2d at 647-652, the Washington Supreme Court utilized the following factors when it evaluated the trustworthiness of hearsay statements made by B.A. and R.T.:

- (1) whether there is an apparent motive to lie;
- (2) the general character of the declarant;
- (3) whether more than one person heard the statements;
- (4) whether the statements were made spontaneously;
- (5) the timing of the declaration and the relationship between the declarant and the witness;
- (6) whether the statement contains express assertions about past fact;
- (7) whether cross-examination would show the declarant's lack of knowledge;
- (8) whether the possibility of the declarant's faulty recollection is remote; and
- (9) whether circumstances of the statement show there is no reason to suppose that the

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declarant misrepresented the defendant's involvement.

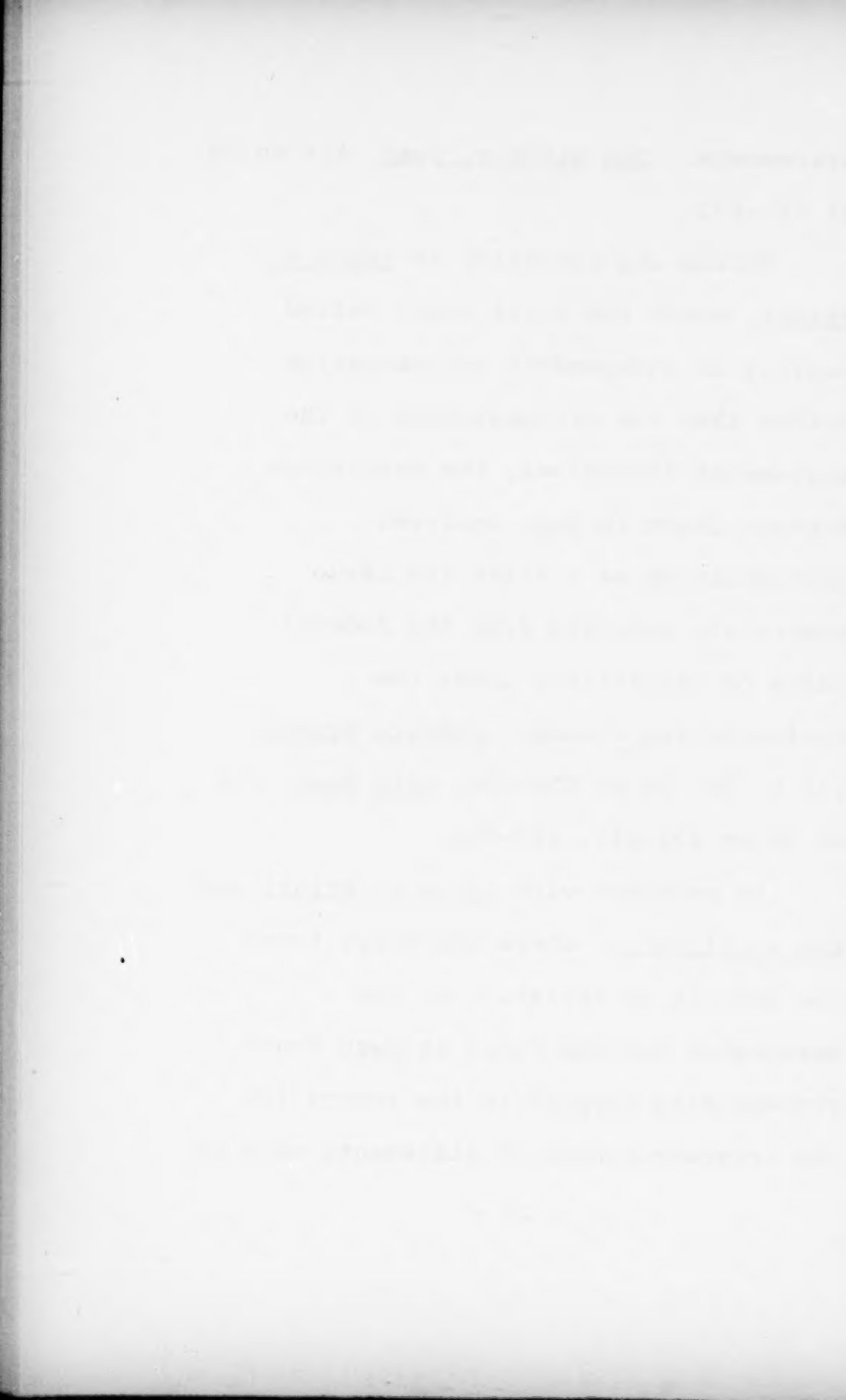
Id. at 647-648.

Both Idaho v. Wright, 111 L. Ed. 2d at 653-654, an earlier case, Lee v. Illinois, 476 U.S. 530, 543 (1986), establish that when hearsay evidence does not fall within a "firmly rooted hearsay exception," it is presumptively unreliable and inadmissible under the Confrontation Clause. These cases hold open the possibility that this presumption can be rebutted by showing that "particularized guarantees of trustworthiness" are present. In the Swans' case, the Washington Supreme Court thoroughly reviewed the record, focusing directly on the circumstances under which B.A. and R.T. made their out-of-court

statements. See State v. Swan, 114 Wn.2d
at 647-652.

Unlike the situation in Idaho v. Wright, where the trial court relied heavily on independent corroboration rather than the circumstances of the statements themselves, the Washington Supreme Court in Swan analyzed corroboration as a state law issue completely separate from the federal issue of reliability under the Confrontation Clause. Compare Wright, 111 L. Ed. 2d at 656-658, with Swan, 114 Wn.2d at 621-641, 647-652.

In contrast with Idaho v. Wright and Lee v. Illinois, where the Court found few indicia of reliability, the Washington Supreme Court in Swan found overwhelming support in the record for the trustworthiness of statements made by



B.A. and R.T. Evaluating the circumstances under which B.A. and R.T. made their out-of-court statements in Swan, the Washington Supreme Court found sufficient guarantees of trustworthiness to overcome the presumption against admissibility, including:

1. no motive to lie;
2. declarants' reputation for truthfulness;
3. explicit, graphic accounts of abuse in age-appropriate language;
4. questions posed during the interviews with B.A. and R.T. were open-ended; many answers were purely spontaneous; answers given to leading questions had already been disclosed either spontaneously or in response to open-ended queries;
5. five people heard the girls' statements;
6. timing was consistent with trustworthiness;
7. the witnesses who heard the girls' statements were in relationships of trust and confidence with the declarants;

- 8 R.T.'s complaints of pain described a present state rather than past facts; and
9. cross-examination would have been futile;

State v. Swan, 114 Wn.2d at 647-652.

These facts surrounding B.A.'s and R.T.'s out-of-court statements demonstrate "particularized guarantees of trustworthiness." The Washington Supreme Court's analysis and conclusion that no Confrontation Clause violation occurred are consistent with the requirements of Ohio v. Roberts, Idaho v. Wright and Lee v. Illinois, supra.

CONCLUSION

Certiorari should be denied, because RCW 9A.44.120, on its face and as interpreted by the Washington Supreme Court in State v. Swan, meets Sixth Amendment requirements. Particularized

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TO THE EDITOR OF THE JOURNAL OF THE AMERICAN CHEMICAL SOCIETY
FROM THE DEPARTMENT OF CHEMISTRY
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RE: [Illegible Title]
[Illegible text block containing details of the research or publication]

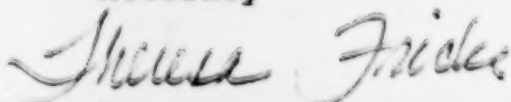
[Illegible text block, likely a reference or acknowledgment section]

guarantees of trustworthiness surrounded the out-of-court statements by B.A. and R.T. Circumstances of the victims' statements, analyzed under the Washington Supreme Court's multi-factor method, overcame the presumption against admissibility.

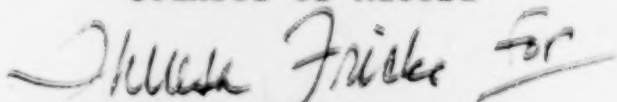
DATED this 10th day of December, 1990.

Respectfully submitted,

NORM MALENG
King County Prosecuting
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Senior Appellate Attorney
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